[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-11976

Non-Argument Calendar

DAVID CLUM, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket Nos. 0:22-cv-60954-WPD,
0:11-cr-60273-WPD-3

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Before GRANT, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

David Clum, Jr., a federal prisoner proceeding pro se, appeals the district court's order dismissing his 28 U.S.C. § 2255 motion. The motion was dismissed for lack of jurisdiction because it was an unauthorized second or successive motion. The government responds by moving for summary affirmance of the district court's order. It argues that Clum's § 2255 motion was second or successive because his initial motion was dismissed on the merits in 2017 and the predicates for his claims were ripe when he filed his initial § 2255 motion. We agree and grant the government's motion for summary affirmance.

I.

Clum was convicted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 286, and 41 counts of making a false claim upon the United States, in violation of 18 U.S.C. §§ 287 and 2. He was sentenced to 293 months imprisonment. On direct appeal, we affirmed his convictions and sentence. *See United States v. Clum*, 607 F. App'x 922 (11th Cir. 2015).

In 2016, Clum petitioned for a writ of habeas corpus, under 28 U.S.C. § 2241. His petition was filed in the Eastern District of Arkansas, where he was being held in custody. That court recharacterized his petition as a § 2255 motion to vacate and

A 2/5

transferred it to the Southern District of Florida, where he was sentenced. In recharacterizing the petition, the Arkansas district court informed Clum that he would be limited in his ability to file successive motions and gave him a chance to withdraw. Clum did not withdraw and his § 2255 motion was denied in the Southern District of Florida.

Last year, Clum filed a second § 2255 motion. He claims that he was actually innocent and did not participate in the conspiracy to file fraudulent tax claims. In support, he attached an affidavit from Penny Lea Jones, one of his codefendants, that he says he could not have procured at trial. He also claims that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which he says he only discovered during his initial § 2255 proceeding. And he claims that his trial counsel was ineffective when he stated that he was unable to review all the discovery evidence and by not calling Jones to testify in Clum's defense.

The district court sua sponte dismissed the motion for lack of jurisdiction because the motion was second or successive and filed without the permission of the court of appeals. Clum appealed the district court's order and the government now moves for summary affirmance.

II.

We review de novo a district court's dismissal of a § 2255 motion as second or successive. *Boyd v. United States*, 754 F.3d 1298, 1301 (11th Cir. 2014). Summary disposition is appropriate where

A 3/5

"the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

III.

Section 2255 allows a federal prisoner to collaterally attack his conviction and sentence. *See* 28 U.S.C. § 2255(a). But the statute only authorizes a single motion as of right; a federal prisoner who wishes to file a second or successive motion to vacate must move the court of appeals for an order authorizing the district court to consider such a motion. *See id.* § 2255(h); *id.* § 2244(b)(3)(A). If a movant submits a second or successive § 2255 motion without first receiving authorization, a district court is without jurisdiction to hear the case and must dismiss the motion. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003).

Clum's motion is second or successive because his initial § 2241 petition was recharacterized as a § 2255 motion and dismissed on the merits. A numerically second or successive § 2255 motion, however, does not always qualify as second or successive. *See Stewart v. United States*, 646 F.3d 856, 859–60 (11th Cir. 2011). When the basis for a numerically second or successive motion did not exist before proceedings on the initial § 2255 motion concluded, the claim falls within "a small subset of unavailable claims that must not be categorized as successive." *Id.* at 863. Claims that are based on facts that existed at the time of the first habeas petition but were not discovered until later are still

A 4/5

successive. *See id.* But a § 2255 motion filed based on the vacatur of prior convictions is not successive when the convictions were vacated after the movant's first § 2255 motion was filed. *See id.*

The factual predicates to support Clum's claims existed when he filed his initial § 2255 motion and there has been no intervening judgment. Clum says that the Jones affidavit, which he included in support of his misjoinder claim, was unavailable to him at the time of his first motion. But the facts that Jones attests to existed at the time of his trial and when he filed his first motion, so his claims based on this supposedly new evidence are still successive. *See id.* Moreover, the *Brady* violations occurred at his trial and before his initial § 2255 motion and his ineffective-assistance-of-counsel claim is based on information available to him at trial. Accordingly, Clum's motion is second or successive and the district court lacked jurisdiction to consider it. Because we have not permitted Clum to file a second or successive motion, the government's position is clearly correct as a matter of law.

The government's motion for summary affirmance is **GRANTED**.

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DAVID CLUM, Movant, vs. UNITED STATES OF AMERICA., Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
2022 U.S. Dist. LEXIS 244921
CASE NO.
22-60954-CIV-DIMITROULEAS,17-61687-CIV--DIMITROULEAS,11-60273-CR--DIMITROULEAS
May 25, 2022, Decided
May 26, 2022, Entered on Docket

Counsel {2022 U.S. Dist. LEXIS 1}David Clum, Jr. (0:17cv61687, 0:22cv60954), Plaintiff, Pro se, Forrest City, AR USA.

For C V Rivera, Warden, FCC-AR Low, Defendant (0:17cv61687): Noticing 2255 US Attorney, LEAD ATTORNEY.

For USA, Defendant (0:17cv61687): Noticing 2255 US Attorney, LEAD ATTORNEYS; Alicia E. Shick, Bertha R. Mitrani, LEAD ATTORNEYS, United States Attorney's Office, Fort Lauderdale, FL USA.

For United States of America, Defendant (0:22cv60954): Noticing 2255 US Attorney, LEAD ATTORNEY.

For UNITED STATES OF AMERICA., Respondent (0:11cr60273): Bertha R. Mitrani, LEAD ATTORNEY, United States Attorney's Office, Fort Lauderdale, FL USA; Jed M. Silversmith, LEAD ATTORNEY, U.S. Department of Justice, Tax Division 601 D Street NW, Washington, DC USA; Jonathan R. Marx, LEAD ATTORNEY, U. S. Department of Justice, Washington, DC USA; Carlos Javier Raurell, Vivian Rosado, United States Attorney's Office, Miami, FL USA; Danielle Nicole Croke, US Attorney's Office, Southern District of Florida, West Palm Beach, FL USA.

Judges: **WILLIAM P. DIMITROULEAS**, United States District Judge.

Opinion

Opinion by: **WILLIAM P. DIMITROULEAS**

Opinion

FINAL JUDGEMENT AND ORDER DISMISSING MOTION TO VACATE

This Cause is before the Court on Movant Clum's *pro se* May 9, 2022 Motion{2022 U.S. Dist. LEXIS 2} to Vacate [DE-1]. The Court has considered the Court file and PreSentence Investigation Report (PSIR), and having presided over this cause, finds as follows:

11-60273CR

1. On November 10, 2011, Clum was indicted. [CR-DE-31]. On May 17, 2012, a Grand Jury returned a Superseding Indictment charging Clum and six (6) others with Conspiracy to Defraud the U.S. and forty-one (41) counts of Making False Claims against the U.S. [CR-DE-245]. Clum and Co-Defendants Michael Beiter, Christopher Marrero and Dale Peters proceeded to trial. Co-Defendants Laura Barel, John Michael Smith and Penny Jones pled guilty before the trial. Martin Feigenbaum had been appointed as CJA counsel for Clum on December 2, 2011. [CR-DE-59]. Clum was given a *de novo* detention hearing on December 22, 2011. He was ordered detained.

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[CR-DE-77, 122]. A Notice of Appeal was filed on December 27, 2011. [CR-DE-128]. The Eleventh Circuit affirmed on October 15, 2012. [CR-DE-620]. Numerous pre-trial motions were filed. [CR-DE-129, 174, 215, 304, 305, 314, 322, 324, 335, 346, 350, 368, 373, 375, 388, 398, 406, 420, 457, 476]. On March 1, 2012, a motion was filed to appoint additional counsel to assist with the voluminous discovery.{2022 U.S. Dist. LEXIS 3} [CR-DE-201]. On March 2, 2012, this Court appointed Russell Aoki as Coordinating Discovery Attorney. [CR-DE-204]. On April 24, 2012, trial counsel filed a Motion to Dismiss claiming a due process violation because Clum would never be able to review all of the discovery. [CR-DE-215]. The Court denied relief on May 14, 2012. [CR-DE-242]. On August 1, 2012, this Court held a hearing on defense counsel's Motion to Withdraw. [CR-DE-814]. Clum had accused his trial counsel of Misprison of a Felony. [CR-DE-334, p. 10]. Clum contended that counsel had a conflict in not filing a motion to dismiss based on perceived perjury before the Grand Jury. At the hearing, defense counsel told Clum that he would not file a motion to dismiss based on perjury, and Clum waived the issue. [CR-DE-814, pp. 13-14]. The Motion to Withdraw as counsel was denied, as withdrawn. [CR-DE-357, 365].

2. On October 29, 2012, after a lengthy trial, Clum was found guilty on all forty two (42) counts. [CR-DE-603].

3. On November 27, 2012, this Court denied Clum's Motion for New Trial. [CR-DE-626]. On November 28, 2012, after considering Clum's Reply [CR-DE-628], this Court entered an Amended Order Denying Motion for New Trial.{2022 U.S. Dist. LEXIS 4} [CR-DE-629]. Objections to the Pre Sentence Investigation Report (PSIR) were filed. [CR-DE-660, 668, 677, 698]. Letters of support were filed. [CR-DE-688]. Motions for Downward Departure were filed. [CR-DE-692, 696].

4. On February 1, 2013, this Court sentenced Clum to 293 months in prison. [CR-DE-717].

5. On February 6, 2013, Clum filed a Notice of Appeal [CR-DE-721]. On February 26, 2014, in an eighty-six (86) page brief (13-10602) and in adopting Issues I, II, and IV from Dale Peter's brief, and in adopting Issue I in Michael Beiter's brief and in adopting Dale Peters' and Christopher Marrero's Reply briefs, the following claims were raised:

A. whether the First Amendment shielded defendants' active participation in the creation, promotion, and functioning of a scheme to defraud the United States from prosecution;

B. whether the United States adduced sufficient evidence at trial from which the jury could reasonably infer beyond a reasonable doubt that defendants willfully intended to conspire to file false claims against the United States, and whether there was sufficient evidence connecting Clum to his role in the Forever Grace aspect of the conspiracy;

C. whether the Court properly exercised its{2022 U.S. Dist. LEXIS 5} discretion when it refused to sever three counts from the remaining forty-two (42) counts;

D. whether the Court properly exercised its discretion when it refused to dismiss the indictment where an IRS Agent gave false testimony to the grand jury;

E. whether the Court properly exercised its discretion in denying Clum's Motion for a Bill of Particulars;

F. whether the Court correctly exercised its discretion when it admitted, over Peters' objections under Fed. R. Evid. 403; certain evidence that helped establish Peters' intent and proved Peters' identity;

G. whether the Court properly denied Clum's motions for a mistrial where the prosecutor's closing argument made certain inflammatory statements, such as Clum being "anti-American" and comparing Clum to a "terrorist";

B 2/18

H. whether the sentences the Court imposed were proper on procedural and substantive grounds, (See Issues listed in Appellee's June 27, 2014 brief in 13-10602)

6. On April 13, 2015, the Eleventh Circuit Court of Appeal affirmed. [CR-DE-851]. *U.S. v. Clum*, 607 Fed. Appx 922 (11th Cir. 2015). The appellate court found that the jury could have reasonably found the requisite intent, *Clum*, 607 Fed. Appx. at 927. Clum had adopted Beiter's First Amendment complaint *Id* at 928 n.5, and it was rejected. *Id* at 928. Clum's suggetions that mistrials should have been{2022 U.S. Dist. LEXIS 6} granted on two (2) occasions were rejected. *Id.* Clum's complaint about the prosecutor's calling him "anti-American" was not improper, as it was supported by the evidence. *Id* at 929. Clum's cumulative error complaint was also rejected. *Id* at 930. The appellate court found no error in enhancing Clum's guidelines because of sophisticated means. *Id* at 931. Finally, the following issues did not warrant any discussion because:

A. the judge properly calculated the amount of tax loss, U.S.S.G. 2T1.1(c);

B. did not err in not reducing Peter's sentence based on minor or minimal role, see generally *United States v. Rodriguez De Varon*, 175 F. 3d 930 (11th Cir. 1999);

C. the judge did not err in sentencing Clum as the leader/organizer of the conspiracy;

D. the judge did not err in not reducing Clum's sentence based on acceptance of responsibility, see *United States v. Gonzalez*, 70 F. 3d 1236, 1239 (11th Cir. 1995) (describing examples of rare situations in which a defendant goes to trial contesting factual guilt and still qualifies for a reduction based on acceptance of responsibility);

E. Clum's sentence was substantively reasonable and sufficiently explained by the judge;

F. the judge explained, and Marrero agreed, his base-offense level would have been the same if the judge had used § 2B1.1 or § 2T1.9 of the Sentencing Guidelines, *United States v. Keene*, 470 F. 3d 1347, 1350 (11th Cir. 2006) ("[I]t would make no sense to set aside this reasonable sentence and send the case{2022 U.S. Dist. LEXIS 7} back to the district court since it has already told us that it would impose exactly the same sentence ...."); and

G. the judge imposed an upward variance - not an upward departure - when sentencing Marrero, *United States v. Kapordelis*, 569 F. 3d 1291, 1316 (11th Cir. 2009) (holding the district court applied an upward variance, when it "did not cite to a specific guideline departure provision, and its rationale was based on the § 3553(a) factors and its finding that the Guidelines were inadequate"). We conclude the remaining issues are abandoned. *United States v. Jernigan*, 341 F. 3d 1273, 1283 n. 8 (11th Cir. 2003). *Clum*, 607 Fed. Appx. at 930 n. 7.

Rehearing was denied on July 15, 2015. Mandate issued on July 23, 2015. The U.S. Supreme Court denied certiorari on November 30, 2015. [CR-DE -867]. *Clum v. U.S.*, 577 U.S. 1016 (2015). Rehearing was denied on February 29, 2016. *Clum v. U.S.*, 577 U.S. 1185 (2016).

7. On October 20, 2015, Clum filed a Motion for New Trial Based on Newly Discovered Evidence [CR-DE -858]. It was denied on November 3, 2015. [CR-DE-862]. The Court found that Michael Beiter's affidavit was not newly discovered evidence. On November 6, 2015, this Court granted counsel's motion to withdraw and denied the appointment of substitute counsel, as Clum could file a *pro se* appeal. [CR-DE-866]. No appeal was filed.

16-149CV

8. On November 9, 2016, Clum filed a § 2241 habeas petition in the Eastern District of Arkansas{2022 U.S. Dist. LEXIS 8} [DE-1 in 16-149]. On February 8, 2017 the Eighth Circuit denied

B 3/18

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the request for mandamus. [DE-11 in 17-61678]. On February 2, 2017, Magistrate Judge J. Thomas Ray recommended reclassification and gave a *Castro* warning [DE-10 in 17-61687CV. On February 9, 2017, Clum filed an objection [DE-13 in 17-61687CV]. Contrary to the *Castro* warning, he did not request a dismissal of his habeas petition; he did not consent to reclassification under § 2255; he requested that his habeas petition be granted. The only way he could receive relief was to reclassify the habeas petition. On August 22, 2017, the Eastern District of Arkansas transferred Clum's petition to the Southern District of Florida and re-characterized it as a Motion to Vacate under 28 U.S.C. § 2255. [DE-22 in 17-61687], *Clum v. Rivera*, 2017 WL 3610573 (E.D. Ark. 2017). He filed numerous motions.1 Meanwhile, on May 30, 2017, Clum had filed an Amended Mandamus Petition in the United States Supreme Court [DE-19]; it was denied on October 2, 2017. *In re: David Clum, Jr.*, 138 S. Ct 259 (2017). On October 27, 2017, the U.S. Supreme Court received a petition for habeas corpus. (17-6513). It was denied on November 27, 2017. *In re: Clum*, 138 S. Ct 491 (2017).

17-61687CV

9. In the first timely collateral attack transferred to this court, Clum raised numerous complaints. The Court was aware{2022 U.S. Dist. LEXIS 9} of its responsibility under *Clisby v. Jones*, 960 F. 2d 925 (11th Cir. 1992) to address all of movant's complaints. However, such a task was made difficult when complaints were buried in a thirty-five (35) page single spaced complaint and a forty (40) page memorandum. [DE-38-2]. The court attempted to address the complaint as restated and reordered by the Government in the following thirty-three (33) claims, [DE-32, pp. 2-3]:

(A) Petitioner is "actually, factually, and legally" innocent because no probable cause existed to indict him and the record proves there was "no possibility" that he had any criminal intent;

(B) the Government committed prosecutorial misconduct before the grand jury by allowing an IRS agent to give false testimony;

(C) the Government committed prosecutorial misconduct in presenting at trial, sentencing and appeal an "Accounts Receivable Statement" claiming it to be a "Loss Statement which [the Government] knew was legally false and not in compliance with [Generally Accepted Accounting Principles];

(D) the Government committed prosecutorial misconduct throughout the trial by using inflammatory comments and labels, including, but not limited to, "tax protestor" "patriot", and "sovereign;"

(E) the Government committed{2022 U.S. Dist. LEXIS 10} prosecutorial misconduct by altering transcripts;

(F) the Government did not inform the grand and petit jurors that Petitioner had filed amended tax returns;

(G) the Court wrongly denied Petitioner's Rule 29 motion regarding its ruling that Petitioner participated in one over-arching conspiracy involving PMDD and Forever Grace;

(H) the Court wrongly denied Petitioner's Rule 29 motion (adopted) and renewed motion to dismiss regarding its ruling that Agent Lovaro's testimony before the grand jury was not false;

(I) the Court wrongly denied Petitioner's motion for new trial "DE 617 before [Petitioner had an] opportunity to reply;"

(J) the Court wrongly denied Petitioner's right to counsel to appeal the denial of a new trial;

(K) the Court made improper comments and rulings during voir dire;

(L) the Court erred by failing to admonish sleeping jurors;

B 4/18

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(M) the Court excluded certain expert testimony;

(N) the Court wrongly denied Petitioner full access to discovery materials before trial

(O) the Court arbitrarily arrived at a monetary amount of loss during sentencing;

(P) the Court gave confusing jury instructions;

(Q) the Court 'coach[ed]' the prosecutors;

(R) the Court failed to provide the jury with a requested{2022 U.S. Dist. LEXIS 11} exhibit list;

(S) the Court "rescind[ed] a pretrial *in limine* order and permitted the prosecutor to label Petitioner as a "tax protestor";

(T) the Court wrongly denied Petitioner's motions for mistrial;

(U) the Court wrongly denied Petitioner's motion for severance, bill of particulars and "30+ other defense pretrial motions;"

(V) Counsel was ineffective for refusing to call CPA Rick Abdallah as a witness at trial;

(W) Counsel was ineffective for failing to review all of the discovery;

(X) Counsel was ineffective for failing to file motions to dismiss on grounds of prosecutorial misconduct regarding grand jury fraud, impossibility of being able to review volume of discovery, "among others;"

(Y) Counsel was ineffective for failing to advise Petitioner not to testify at trial;

(Z) Counsel was ineffective for failing to show "crucial exculpatory DVD" of Winston Shrout teaching OID process;

(Z) Counsel was ineffective for failing to object to each of the "claimed false tax returns;"

(AA) Counsel was ineffective for failing to file a motion for mistrial regarding Ms. Henline's testimony that under the IRS 6702 - "Frivolous Tax Submission" there is no criminal penalty;

(BB) Counsel was ineffective{2022 U.S. Dist. LEXIS 12} for failing to "take Due Process mandamus to Supreme Court ignoring Petitioner's request

(CC) Counsel was ineffective for failing to amend Certiorari re: Beiter's Affidavit, new trial motion and denial;

(DD) Counsel was ineffective for advising Petitioner to proceed at trial when he had believed for the "previous 10 months ... Petitioner 'had no chance at acquittal;'"

(EE) Counsel was ineffective for failing to object to the Court's not immediately striking a juror claiming a potential language issue during voir dire;

(FF) Ineffective Assistance of Counsel in Tennessee;

(GG) Eleventh Circuit Errors.

10. On November 9, 2017 this Court considered Clum's Motion to Alter/Amend [DE-38],Motion to Expand the Record [DE-39-1], Motion to Compel [DE-39-2], Motion to Appoint Counsel [DE-40] and Motion to Strike [DE-41], and denied those motions. [DE-42]. Clum's amendment repeated many of his prior complaints, but concentrated on alleged:

(A) Brady violations

B 5/18

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(B) False Testimony

(C) Ineffective Assistance of Counsel

(1) Refused to call witnesses

(2) Failed to Investigate

(3) No accountant defense.

(4) Failed to hire a forensic accountant who would have stated that Clum was a victim.(D) Newly discovered evidence{2022 U.S. Dist. LEXIS 13} about Rick Abdallah. However, Clum concedes that counsel was wary of calling him. [DE-38-2, p. 6].In an abundance of caution, the Court attempted to consider these additional claims. However, many of these accusations, as well as those contained in the original motion to vacate, were conclusory and insufficient upon which to base any relief. Issues averted in a perfunctory manner in a motion to vacate unaccompanied by some effort at developed argumentation, are deemed waived. *Thomas v. U.S.*, 849 F. 3d 669, 679 (6th Cir.) *cert. denied*, 138 S. Ct. 261 (2017); *Carabello-Torres*, 887 F. Supp. 2d. 387, 393 (D.P.R. 2012).

11. The Court found that matters previously decided on direct appeal should not be re-litigated in a collateral attack. *U.S. v. Nyhius*, 211 F. 3d 1340, 1343 (11th Cir. 2000); *Rozier v. U.S.*, 701 F. 3d 681, 684 (11th Cir. 2012), *Owens v. U.S.*, 174 F. 2d 469 (5th Cir. 1949) *cert. denied*, 338 U.S. 906 (1949). Therefore, this Court did not need to consider Claims One, Two, Three, Four, Seven, Eight, Fourteen, Fifteen, Twenty and Twenty-One.

12. The Court found that matters that could have been raised on direct appeal should not be heard on a collateral attack. *Lynn v. U.S.*, 365 F. 3d 1225, 1234 (11th Cir. 2004). Claims Five, Six, Nine, Ten, Eleven, Twelve, Thirteen, Sixteen, Seventeen, Eighteen and Nineteen were procedurally barred. No cause or prejudice for failing to raise these issues on appeal had been shown. Clum also did show that he is factually innocent of the charges.

13. Clum alleged ineffective assistance{2022 U.S. Dist. LEXIS 14} of counsel in Claims Twenty-Two, Twenty-Three, Twenty- Four, Twenty-Five, Twenty-Six, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty, Thirty-One, Thirty- Two, and in his motion to alter/amend. The Court found that Martin Feigenbaum is an experienced trial counsel and, as such, the presumption that his conduct was reasonable is even stronger. *Chandler v. U.S.*, 238 F. 3d 1305 1316 (11th Cir. 2000). Moreover, conclusory allegations will not support a claim of ineffective assistance of counsel. *Randolph v. McNeil*, 590 F. 3d 1273, 1276 n. 1 (11th Cir. 2009). Mere speculation that an uncalled witness would have been helpful is insufficient upon which to base any relief. *Streeter v. U.S.*, 335 Fed. Appx. 859, 863-864 (11th Cir. 2009).

14. The Court found that some claims were conclusively refuted by the record.

A. As to Claim Twenty-Five, Clum decided not to testify and understood that he could not later complain if he turned out to be a lousy witness. [CR-DE -777, p. 23]

B. As to Claim Twenty-Eight, Clum complained that a mistrial should have been granted when Mrs. Henline said there were no criminal penalties for filing a frivolous return. [CR-DE-754, p. 195]. However, no motion for mistrial would have been granted. No prejudice has been shown.

C. As to Claim Thirty-One, there was no showing that there was a plea offer. Moreover, there was no showing that Clum would{2022 U.S. Dist. LEXIS 15} have accepted a plea offer. This Court would not have accepted a plea from Clum given his repeated protestations of innocence. Given Clum's

B 6/18
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testimony at trial [CR-DECase 777, pp. 54-176; CR-DE-778, pp. 6-97], it is highly unlikely that this Court would have accepted a guilty plea. No error had been shown.

15. First, Clum claimed that he is factually innocent and that there was no probable cause to indict him and that he did not have any criminal intent. As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack. Moreover, the jury decided otherwise. To establish actual innocence, Clum must establish that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. *Bousley v. U.S.*, 523 U.S. 614, 623 (1998). No such showing had been made. Sprinkled in with these allegations were numerous other unrelated complaints.

A. There was more than enough evidence of Clum's guilt presented to the jury.

B. Clum's conclusory allegation of actual innocence is not a basis for relief. *See Hall v. Davenport*, 2016 WL 5349485*18 (M.D. Ala. 2016).

C. Moreover, it was up to the jury to weigh Shauna Henline's testimony about the Frivolous Return Program and determine whether that evidence created{2022 U.S. Dist. LEXIS 16} a reasonable doubt about Clum's intent. Her lay testimony about what she thought was subject to criminal penalties was not binding on the jury or this Court. Information from other trials where Henline so testified also would not have changed the outcome in this case. Whether tens of thousands of similar frivolous returns were filed in 2008 would not have changed the outcome of this case. No *ex post facto* violation has been shown. Knowledge of the law is not required for a conviction. *U.S. v. Thompson*, 690 F. 3d 977, 994 (8th Cir. 2002), *cert. denied*, 568 U.S. 1240 (2013).

D. A motion for mistrial (Rule 29 in the middle of the Government's case?) would have been denied. No prejudice has been shown.

E. The jury's verdict negated any argument of insufficient evidence before the grand jury. *U.S. v. Mechanik*, 475 U.S. 66, 72-73 (1986). The jury decided that Clum had a criminal intent to commit these crimes. Clum testified that he did not have a criminal intent to commit the crimes. [CR-DE-777, pp. 111-112]. It was up to the jury to determine his credibility; if disbelieved, the jury was authorized to consider Clum's testimony as substantive evidence of his guilt. *U.S. v. McDowell*, 250 F. 3d 1354, 1367 (11th Cir. 2001). As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack. Clum denied involvement{2022 U.S. Dist. LEXIS 17} with Forever Grace. [CR-DE-777, p. 112]. The jury was entitled to disbelieve that testimony. The Court found no evidence of separate conspiracies. [CR-DE-777, p. 15-16].

16. Second, Clum complained that IRS Agent Michelle Lavoro committed perjury before the grand jury by presenting false information and by withholding exculpatory information. Clum's complaint about false testimony was a matter arguably preserved for appeal. As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack. Moreover, no falsity was shown. Moreover, an agent's inadvertent giving of false testimony before the grand jury would not have warranted dismissal of an indictment. *U.S. v. Cavallo*, 790 F. 3d 1202, 1220 (11th Cir. 2015). Additionally, the Government is not obligated to present exculpatory evidence in grand jury proceedings. *U.S. v. Darden*, 688 F. 3d 382, 387 (8th Cir. 2012) *cert.* denied, 133 S. Ct. 2817 (2013); *U.S. v. Williams*, 504 U.S. 36, 53 (1992). Finally, Clum waived the motion to dismiss when he withdrew his complaint about counsel, recognizing that counsel would not be filing a motion to dismiss based on perjury. [CR-DE-814, p. 14]. Indeed, the Court explained to Clum how not filing a motion to dismiss (which could be corrected through a Superseding Indictment) and waiting to make a similar argument{2022 U.S. Dist. LEXIS 18} on a Rule 29 motion could constitute a viable strategy. [CR-DE-814, pp. 8-12]. Sprinkled in with this allegation were numerous other unrelated

B 7/18

complaints: A. Clum also faulted the prosecutor's use of leading questions in the Grand Jury. Clum failed to specify how leading questions were used or how he was prejudiced by the use of leading questions. *U.S. v. McKenzie*, 678 F. 2d 629, 631-32 (5th Cir. 1982). Clum failed to cite any authority forbidding the use of leading questions before the Grand Jury. Indeed, the rules of evidence are relaxed, as even hearsay is admissible before the Grand Jury. *U.S. v. Bowie*, 618 F. 3d 802 (8th Cir. 2010), *cert. denied*, 562 U.S. 1157 (2011). Finally, the Rules of Evidence generally do not apply to Grand Jury proceedings. Rule 1101(d)(2), Federal Rules of Evidence.

B. Clum faulted this Court's Rule 29 decision that Agent Lavoro's grand jury testimony was not false. [CR-DE-777, p. 16]. Matters decided on appeal or matters that could have been raised on appeal (failure to conduct a hearing) are not proper in a collateral attack. Clum's conclusory allegations of fraudulent testimony do not warrant any relief.

C. Complaints to the Department of Justice Office of Professional Responsibility and hunger strikes are not the basis for any relief.

D. This Court's ruling on a motion for new trial is also not a matter for collateral attack.{2022 U.S. Dist. LEXIS 19} Credibility determinations are proper in deciding whether to grant a new trial. Clum complains that counsel did not appeal this court's post-appeal denial of a motion for new trial. However, this Court granted counsel's motion to withdraw and indicated that Clum was not entitled to counsel for a collateral appeal and further indicated that he could file a *pro se* appeal, which he declined to do. Any complaint about this court's November 9, 2015 rulings should have been raised years ago.

E. This Court's comment during voir dire about a joint trial is not the basis for relief. The Court was emphasizing the importance of separate, independent verdicts.

F. The Court's waiting to the end of jury selection to rule on challenges for cause based on language difficulties is not a basis for relief. Trial courts are afforded wide latitude in conducting jury selection. By waiting until the end of voir dire to grant challenges for cause, the Court does not reward juror's conveniently claiming language difficulties just to avoid their civic responsibilities.

G. Clum's speculative complaints, (telegraph messages, the lawyers, and jurors) lumped together, one after the other, do not facilitate a *Clisby v. Jones* analysis.{2022 U.S. Dist. LEXIS 20} In addressing the issue of "sleeping jurors", the Court can employ some levity in impressing upon jurors that they need to pay attention and avoid the appearance that they are not paying attention to the testimony. No permission was given for the jurors to sleep. There is no showing that the Court did not keep any eye on the jurors to monitor their attentiveness. Clum contends that he has a list of sleeping jurors and dates. [D-1, p. 29]. That information was never shared with the Court.

H. This court's sustaining objections to questions about what the law is or should be are not matters properly before this Court now on a motion to vacate. The Court properly sustained objections to Walker Todd's testimony. Matters that could have been raised on direct appeal should not be heard on a collateral attack. *Lynn*, 365 F. 3d at 1234.

I. Clum's complaints about the court's ruling on counsel's needing more time to review discovery did not merit any relief. The Court gave counsel adequate time to review the pertinent documents in the case. The Court even appointed a Coordinating Discovery Attorney to facilitate the discovery in this case. [CR-DE-204]. The Court was not going to delay the trial for years (6.71 years{2022 U.S. Dist. LEXIS 21} [CRDE-468]), so that every page of three (3) terabytes of information and emails could be examined.

J. The Court did not abuse its discretion by making findings on a Motion to Dismiss for Fraud.

B 8/18

K. As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack.

17. Third, the Government's Accounts Receivable Statement, according to Clum, was false and not in compliance with Generally Accepted Accounting Principles. As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack.

18. Fourth, Clum complained about inflammatory prosecutorial comments such as "tax protester", "patriot" and "sovereign". As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack. Moreover, Clum admitted to using those terms (patriot, sovereign) at a seminar. [CR-DE-777, p. 145]. Clum's related, repeated complaint is addressed in paragraph 33 of this order.

19. Fifth, Clum contended that the Government altered transcripts. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on{2022 U.S. Dist. LEXIS 22} a collateral attack. However, Clum offers no support for this conclusory allegation.

20. Sixth, Clum complained that the grand and petit jurors were not told he had filed amended tax returns. However, the jury was told he had filed amended tax returns [CR-DE-778, p. 60]. Moreover, Clum also testified that he had filed amended returns. [CR-DE-777, pp. 112-113, 118, 119, 129, 152]. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack.

21. Seventh, Clum complained that his Rule 29 Motion should have been granted because there were multiple conspiracies: PMDD and Forever Grace. As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack. Forever Grace was just another sham entity operating within the confines of the original PMDD conspiracy. The jury was instructed on multiple conspiracies [CR-DE-600, p. 16; CR-DE-747, pp. 13-14]; the jury decided that this was just a name change. *See also*, paragraph 15(E).

22. Eighth, Clum contended his Rule 29 motion should have been granted because Agent Lavoro's grand jury testimony was false. As indicated in paragraph 11, matters{2022 U.S. Dist. LEXIS 23} previously decided on direct appeal should not be re-litigated on a collateral attack. *See also*, paragraphs 15(E) and 16(B).

23. Ninth, Clum contended that the Court should have awaited his reply before denying his[DE-617] Motion for New Trial. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack. However, no prejudice can be shown in that after Clum's reply was filed on November 28, 2012 [CR-DE-628], this Court entered an Amended Order Denying Motion for New Trial [CR-DE-629].

24. Tenth, Clum contended he was wrongly denied counsel for an appeal of his Motion for New Trial, based on newly discovered evidence. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack. On November 5, 2015, Martin Feigenbaum indicated he could not, in good faith, file an appeal and asked to withdraw as counsel. [CRDE-864]. On November 6, 2015, this Court granted the Motion to Withdraw, but exercised discretion in not appointing counsel. The Court indicated that Clum could file a Notice of Appeal and prosecute it *pro se*, [CR-DE-866]. No appeal was filed. Clum did not have a right to counsel.{2022 U.S. Dist. LEXIS 24} Clum could have filed an appeal and asked the Eleventh Circuit to appoint counsel, or he could have raised the failure to appoint counsel as an issue on appeal. Consequently, this issue was waived. *See also*, paragraph 16(D).

25. Eleventh, Clum complained about improper comments and rulings during voir dire. As indicated

B 9/18

in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack. *See also*, paragraphs 16(E), (F),(G) and 46.

26. Twelfth, Clum complained that the Court should have admonished sleeping jurors. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack. *See also*, paragraph 16(G).

27. Thirteenth, Clum complained about excluded expert testimony. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack.

28. Fourteenth, Clum complained he was denied access to discovery materials pre-trial. As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack. *See also*, paragraph 16(I).

29. Fifteenth, Clum complained about the amount of loss determined at sentencing.{2022 U.S. Dist. LEXIS 25} As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack. The Court properly calculated intended loss. *U.S. v. Walter-Eze*, 869 F. 3d 891, 896 (9th Cir.2017);*U.S. v. Johnson*, 795 F. 3d 840, 846 (8th Cir. 2015). The Government introduced a fourteen (14) page spreadsheet detailing $166,676,471.08 in fraudulent claims. The Court did not err in giving Clum the benefit of the doubt in only accessing half of that amount as intended loss. To have affected the advisory guidelines, the intended loss would have had to be less than $50,000,000. U.S.S.G. § 2B1.1(b)(1)(M).

30. Sixteenth, Clum complained about confusing jury instructions. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack. The complained of instruction [CR-DE-600, p. 21; CR-DE-747, p. 17] was based upon a proposed Government instruction (Pinkerton #17) [CR-DE-536, p. 26]. It was proposed by the Government on September 30, 2012, before Penny Jones pled guilty. It inadvertently included Jones, instead of Marrero. The only objection to the instruction being given was that it was duplicative of the aider and abetter instruction. [CR-DE-746, p. 202]. No prejudice to Clum was shown. Additionally, there was also no objection{2022 U.S. Dist. LEXIS 26} to the jury instruction on 18 U.S.C. § 287. [CR-DE-746, p. 200]. Here, the Court gave a good faith instruction, over the Government's objection [CR-DE-746, p. 205]. The Court was not concerned about being reversed, but was concerned about being fair. [CR-DE-746, p. 206]. Clum's complaints about the Court's commenting that is not a tax case are taken out of context. No prejudice has been shown.

31. Seventeenth, Clum stated that the Court coached the prosecutors. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack. The court sustained an objection subject to a time-frame being given. [CR-DE-755, p. 141]. Clum would have one believe that this Court acted as a second prosecutor in this case. However, the Court was not coaching the prosecutors when it denied their request to split closing arguments between two prosecutors. [CR-DE-778, p. 237]. The Court was not coaching prosecutors when it overruled the Government's objection to the introduction of Clum's military record. [CR-DE-777, p. 59]. The Court denied the Government's request for an obstruction of justice enhancement and reduced the amount of intended loss by over $80,000,000.{2022 U.S. Dist. LEXIS 27} [CR-DE-779, pp. 52-53].

32. Eighteenth, Clum indicated the jury should have been provided with a requested exhibit list. As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack. Here, defense counsel objected to the jury being given an exhibit list. [CR-DE-749, pp. 8-19]. Had the exhibit list been given, it is likely that Clum would have advanced that adverse decision as being error. No error has been shown.

33. Nineteenth, Clum complained that the Court rescinded a Motion in Limine ruling and allowed him

B 10/18

to be labeled a "tax protestor." As indicated in paragraph 12, matters that could have been raised on direct appeal should not be heard on a collateral attack. However, the Court never granted the motion in limine. The court found that the probative value outweighed any prejudice and that there might be evidentiary support for those terms. [CR-DE-505]. Indeed, there was that support. The court's omitting two words from voir dire questions did not constitute granting a motion in limine. [CR-DE-830,p. 13]. No error was shown.

34. Twentieth, Clum contended his motions for mistrial should have been granted. As indicated{2022 U.S. Dist. LEXIS 28} in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack.

35. Twenty-First, Clum contended the Court wrongly denied pretrial motions, including severance and bill of particulars. As indicated in paragraph 11, matters previously decided on direct appeal should not be re-litigated on a collateral attack.

36. Twenty-Second, Clum contended trial counsel was ineffective in failing to call CPA Rick Abdallah as a witness. This allegation seemed to be inconsistent with Clum's allegation of newly discovered evidence. In any event, Clum has not shown how this impeachable, speculative testimony would have been anything other than cumulative to his other rejected bases for a good faith defense. Clum seems to have even alluded to Abdallah in his testimony. [CR-DE-777, p. 132]. At trial, Clum only alluded to Abdallah, without naming him. Now, the defense apparently would have been that Clum relied on Abdallah, more than Penny Jones, in being duped. [DE-38-2, p. 28]. Clum proferred many authorities that he allegedly relied on to support his "good faith" defense:

A. Sam Kennedy Restore America Seminar. [CR-DE-777, pp. 61, 81].

B. Book by G. Edward{2022 U.S. Dist. LEXIS 29} Griffen [CR-DE-777, p. 62].

C. Mandrake Mechanism [CR-DE-777, p. 67].

D. Modern Money Mechanics [CR-DE-777, p. 69].

E. "I Bet You Thought" [CR-DE-777, p. 71].

F. Executive Order 6102 [CR-DE-777, p. 72].

G. Art 1 § 10 of Constitution [CR-DE-777, p. 75].

H. House Joint Resolution 192 [CR-DE-777, p. 77].

I. Chicago Federal Reserve Publication [CR-DE-777, p. 82].

J. Second Kennedy Seminar [CR-DE-777, p. 82].

K. San Antonio Seminar [CR-DE-777, p. 82].

L. Radio Show [CR-DE-777, pp, 83-86].

M. Penny Jones e-mails [CR-DE-777, pp. 87, 95-96, 97, 100, 102].

N. Orbit Health Food Store Seminar [CR-DE-777, p. 89].

O. Statutes [CR-DE-777, p. 112].

P. Heinline letter [CR-DE-777, p. 114].

37. Clum has not shown how Abdallah's testimony would have improved his failed "good faith" defense. As indicated in paragraph 13, this conclusory allegation is insufficient upon which to base any relief. Twenty-Third, Clum contended trial counsel did not review all of the discovery. Counsel

B 11/18

cannot be faulted for not reviewing all of the discovery. He requested more time, but the request was denied. As indicated in paragraph 16(I), the Court was unwilling to wait 6.71 years to facilitate counsel's reading every irrelevant e-mail provided in discovery. As{2022 U.S. Dist. LEXIS 30} indicated in paragraph 13, this conclusory allegation is insufficient upon which to base any relief. *See also*, paragraphs 16(I) and 28.

38. Twenty-Fourth, Clum criticized counsel for not filing a motion to dismiss, including allegations of grand jury fraud and the voluminous discovery. No prejudice can be found as such motions would have been denied. Counsel filed numerous voluminous motions in this case, as enumerated in paragraph 1 of this order. Indeed, trial counsel adopted co-defendants' Rule 29 motions, and the Court found Agent Lavoro's testimony to be credible. [CR-DE-777, pp. 15, 16]. As indicated in paragraph 13, this conclusory allegation is insufficient upon which to base any relief. (see also paragraph 16(B).

39. Twenty-Fifth, Clum contended counsel should have advised him not to testify. Clum was advised that it was his life and that he did not have to follow his lawyer's recommendations, but if he decided to testify and he turned out to be a lousy witness that he could not complain about it later. [CRDE-777, pp. 22-23]. As indicated in paragraph 13, this conclusory allegation was insufficient upon which to base any relief. (see also paragraph 14(A))

40. Twenty-Sixth, Clum contended{2022 U.S. Dist. LEXIS 31} counsel should have shown a DVD of Winston Shrout. Clum alluded to Shrout in his testimony. [CR-DE-777, pp. 82, 146]. Counsel alluded to Shrout in his closing argument. [CR-DE-747, p. 112]. It would have been cumulative to Clum's other failed efforts to establish a good faith defense, as indicated in paragraph 36 of this order. Moreover, there is no showing that the DVD would have been admitted. *U.S. v. McQuarry*, 816 F. 3d 1054, 1058 (8th Cir. 2016). As indicated in paragraph 13, this conclusory allegation was insufficient upon which to base any relief.

41. Twenty-Seventh, Clum contended counsel should have objected to claimed false tax returns. As indicated in paragraph 13, this conclusory allegation is insufficient upon which to base any relief. There is no showing that an objection would have been sustained. Additionally, it was defense counsel's strategy to argue that Clum was the first person to file the OID returns, that he had nothing to hide. Objecting to those same returns would have been inconsistent with that strategy. Experienced trial counsel is entitled to deference when it comes to trial strategy.

42. Twenty-Eighth, Clum statesd a motion for mistrial should have been made after Ms. Henline's testimony. It would have been{2022 U.S. Dist. LEXIS 32} denied as indicated in paragraphs 14(B),, 15(C),and 15(D). As indicated in paragraph 13, this conclusory allegation was insufficient upon which to base any relief.

43. Twenty-Ninth, Clum faulted counsel for not pursuing mandamus in the Supreme Court. Trial counsel had no obligation to file such a motion. It was highly unlikely that relief would have been granted on such an extraordinary request. As indicated in paragraph 13, this conclusory allegation was insufficient upon which to base any relief. Clum, as with most petitioners, has had no success in his efforts to gain relief from the U.S. Supreme Court.

44. Thirtieth, Clum contended his certiorari petition should have been amended. As indicated above, it is highly unlikely that relief would have been granted on this conclusory allegation.

45. Thirty-First, Clum faulted counsel for advising him to proceed to trial. It would seem somewhat contradictory to proclaim one's actual innocence to every court that would listen (S.D. Fla., ir., E.D. Ark., 8th Cir. S.Ct.), yet complain that counsel erred in advising him to go to trial. Here, no prejudice can be shown. Clum was adamant that he was not guilty and would not accept a plea. [CR-DE-830,

B 12/18

p. 18].{2022 U.S. Dist. LEXIS 33} The Court would not have accepted a guilty plea. *Id.* No prejudice can be shown. *Missouri v. Frye*, 566 U.S. 134, 147 (2012). As indicated in paragraph 13, this conclusory allegation was insufficient upon which to base any relief. (see also paragraph 14(C)).

46. Thirty-Second, Clum stated trial counsel should have immediately struck jurors with language difficulties. There is no showing that those jurors were not stricken. Moreover, it was the Court's prerogative as to when to excuse those jurors. No prejudice has been shown. As indicated in paragraph 13, this conclusory allegation is insufficient upon which to base any relief. *See also*, paragraph 16(F).

47. Thirty-Third, Clum complained about ineffective counsel in Tennessee. No prejudice could be shown, as Clum received a *de novo* detention hearing in Florida and detention was ordered and affirmed by the Eleventh Circuit. As indicated in paragraph 13, this conclusory allegation is insufficient upon which to base any relief.

48. Thirty-Fourth, Clum complained about erroneous appellate court rulings. Clum complained that the Eleventh Circuit's denial of bond was something Mr. Smith (Co-Defendant's lawyer) had never heard of. He complains about the denial of mandamus. Clum quoteed{2022 U.S. Dist. LEXIS 34} a lawyer as stating that an unpublished opinion is an abomination. None of his assertions merit any relief. Clum cited no authority for this court's having jurisdiction to remedy his perceived problems with the appellate court. *Chambers v. U.S.*, 866 F. 3d 848, 852 (7th Cir. 2017). Finally, Clum cited to no prejudice resulting from an unpublished opinion. *Loritz v. Ninth Circuit*, 382 F. 3d 990, 992 (9th Cir. 2004); *Smith v. Tenth Circuit*, 484 F. 3d 1281, 1286 (10th Cir. 2007), *cert. denied*, 552 U.S. 1182 (2008). As indicated in paragraph 13, this conclusory allegation is insufficient upon which to base any relief.

49. Thirty-Fifth, Clum complained about *Brady* violations. This repetitive, conclusory allegation in the amended motion to vacate did not warrant any relief. *See U.S. v. Horton*, 756 F. 3d 569, 575 (8th Cir.) *cert. denied*, 135 S. Ct. 122 (2014). Clum did not show that Abdallah had favorable evidence to offer in his defense. Clum did not show that the government was or should have been aware of this "alleged favorable evidence". Clum did not show how allegations in unrelated civil lawsuits, filed before and after this trial, would have contained relevant information or that the government knew5 of the information and kept it from Clum. Clum was able to locate this "favorable evidence" in 2017, there is no showing that the same evidence was not discoverable in 2012. *See Grant v. Lockett*, 709 F. 3d 224, 231 (3d Cir. 2013). No prejudice has been shown. *See U.S. v. Brester*, 786 F. 3d 1335, 1339 (11th Cir. 2015).

50. Thirty-Sixth, Clum complained{2022 U.S. Dist. LEXIS 35} about False Testimony. This repetitive, conclusory allegation in the amended motion to vacate did not warrant any relief.

51. Thirty-Seventh, Clum complained about Ineffective Assistance of Counsel. This repetitive, conclusory allegation in the amended motion to vacate did not warrant any relief.

A. Refusal to call witnesses. Clum contended that he complained to everyone about counsel's not calling witnesses. [CR-DE-38-2, p. 3]. Yet Clum pointed to no occasion where he notified this Court of his perceived problem with counsel's not calling witnesses. Certainly, Clum was not reluctant to contact the court or speak up about his grievances, as he admitted in the page before this allegation. [CR-DE-38-2, p. 2]. Clum was not hesitant in attempting to correct his counsel at the calendar call when counsel announced ready for trial. [CR-DE-830, pp. 14-18]. His speculative allegation did not merit any relief. *Sullivan v. DeLoach*, 459 F. 3d 1097, 1109 (11th Cir. 2006) *cert. denied*, 549 U.S. 1286 (2007). Claims that counsel failed to call witnesses are not favored in habeas corpus review. *Woodfox v. Cain*, 609 F. 3d 774, 808 (5th Cir. 2010). Clum showed no basis for his conclusory

B 13/18

allegation that he lost $400,000 in this scheme. Finally, any perceived loss would not have offset his intended gain enough to have affected his{2022 U.S. Dist. LEXIS 36} advisory guideline range or his eventual sentence.

B. Failure to investigate. Clum complained that trial counsel should have investigated Abdallah. He cited to civil cases that he has now located alleging fraud against Abdallah. As Clum has conceded, trial counsel was adverse to calling Abdallah, apparently for good reason. Nevertheless, Clum contended that Abdallah duped him and that trial counsel should have discovered the other instances of Abdallah's defrauding other individuals. However, he cited to only two civil cases6 that were filed before the trial in this case (A third case civil case, *Vega v. Med-America Taping*, No.: 16-8158-CIV (N.D. Ill) was filed in 2016, and it was still pending against Abdallah as an unrepresented Defendant in 2017). Clum contended that somehow, trial counsel should have discovered these pending cases and used this information. Both cases were filed *pro se*. In *Haney v. Abdallah, et al, case no.* 5:11-176 (W.D. Tex. 2011), Haney obtained a default judgement against Abdallah and his company on November 29, 2011. [DE-38 in 5:11-176]. All other defendants were dismissed. [DE-37 in 5:11-176]. In *Teinert v. Abdallah*, case no. 10-4313 (D. Mn. 2011), the case was dismissed with prejudice on April 6, 2011. [DE-33 in 10-4313]. The Eighth Circuit affirmed on November 1,{2022 U.S. Dist. LEXIS 37} 2011. *Teinert v. Abdallah*, 435 Fed. Appx. 566 (8th Cir. 2011). No error had been shown. These conclusory allegations did not merit any relief. *Trottie v. Stephens*, 720 F. 3d 231, 242 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1540 (2014). *See also* paragraph 52.

C. No accountant reliance defense. The jury was instructed on that defense. [CR-DE-600, p. 23; CR-DE-747, pp. 18-19]. Defense counsel argued that there were three "good faith" instructions. [CR-DE-747, pp. 128-129]. No error has been shown.

D. Failed to hire a forensic accountant. There was no proffer of what favorable evidence could have been obtained. This speculative allegation did not merit any relief. *Naranjo v. U.S.* 2013 WL 12213962 *12 (S.D. Fla. 2013). Clum asserted, with no factual support, that he lost money ($400,00) in the scheme. However, Clum did admit to receiving $39,000. [DE-38-2, p. 31].

E. Poor job of cross-examination. This conclusory allegation warranted no relief. *See also*, paragraph 13.

F. Failed to object to the Government's overtures and claims; failed to object to closing arguments. This conclusory allegation warranted no relief. *See also*, paragraph 13.

G. Announced ready for trial when he was not. No prejudice can be shown as a continuance would have been denied. Indeed, Clum had to concede that trial counsel filed a writ of prohibition in order to try and stop the trial. [CR-DE-38-2,{2022 U.S. Dist. LEXIS 38} p. 3]. Absent a stay being granted by the Eleventh Circuit, the trial would have continued. [CR-DE-830, p. 14]. No error has been shown. Here, this "ignored issue" was not clearly stronger than those presented. *Hand v. Houk*, 871 F. 3d 410 (11th Cir. 2017)

H. Failed to raise issues of ineffective assistance of counsel on appeal. Clum expected trial counsel to raise issues of his own ineffectiveness on appeal? Ineffective of counsel claims are rarely properly heard on a direct appeal. *U.S. v. Armas*, 2017 WL 4785944 *5 (11th Cir. 2017) *citing, Massarro v. U.S.*, 538 U.S. 500, 504-505 (2003); *U.S. v. Kifwa*, 868 F. 3d 55, 63-64 (1st Cir. 2017). No error has been shown.

I. Clum contended that trial counsel confessed (or later apologized) that he was ineffective. However, even if true, a lawyer's subjective belief that his performance was deficient is far from determinative. *Johnson v. Upton*, 615 F. 3d 1318, 1337 n. 17 (11th Cir. 2010), *cert. denied*, 564 U.S. 1027 (2011). Moreover, even a breach of an ethical standard does not necessarily equate to a Sixth

B 14/18

Amendment violation. *U.S. v. Dehlinger*, 740 F. 3d 315, 321 n. 4 (4th Cir.), *cert. denied* 135 S. Ct. 98 (2014). Here, Martin Feigenbaum is an experienced trial counsel, and the presumption that his conduct was reasonable is ever stronger. *Chandler v. U.S.*, 218 F. 3d 1305, 1316 n. 18 (11th Cir. 2000). The court told Clum that "I don't know that there's any lawyer in town that I could appoint for you, Mr. Clum, that would do a better job than Mr. Feigenbaum" [CR-DE-814, p. 6]. Later, Clum was told, "I haven't heard a thing that Mr. Feigenbaum has done in{2022 U.S. Dist. LEXIS 39} this case that is anything other than excellent lawyering on your behalf." [CR-DE-814, pp. 10-11]. Nothing in Clum's pleadings, filed in this case, had or has changed this Court's assessment of Mr. Feigenbaum's assistance.

J. Clum faulted counsel for not responding to all of his 200 letters and e-mails. This conclusory allegation warranted no relief. *See also*, paragraph 13. Clum did not show how additional consultation could have altered the outcome of the trial. *Bowling v. Parker*, 344 F. 3d 487, 506 (6th Cir. 2003), *cert. denied*, 543 U.S. 842 (2004).

K. Clum complained that trial counsel did not seek proper jury instructions. This conclusory allegation did not warrant any relief. *See also*, paragraph 13.

L. Clums faulted trial counsel for not investigating other parties. This conclusory allegation did not warrant any relief.

M. Clum stated Lavaro should have been impeached with her grand jury testimony. This conclusory allegation did not warrant any relief.

N. Clum faulted trial counsel for not calling Penny Jones as a witness. There was no showing that Jones would have testified, and if so, favorably, as a defense witness. *See also*, paragraph 52.

O. Clum repeated his complaint about failing to call an expert. *See also*, paragraph 51(D). Clum failed to establish{2022 U.S. Dist. LEXIS 40} the relevance of Jill Clum's later allegedly receiving funds from the Government.

P. Clum complained about ineffective cross-examination of Laura Barel. This conclusory allegation did not merit any relief.

Q. Clum's complaint about cumulative error did not merit any relief.

52. Thirty-Eighth, Clum complained about Newly Discovered Evidence about Rick Abdallah. Clum was unsuccessful in painting the absent Penny Jones as the real culprit in the case. Any attempt to similarly portray himself as a dupe of Rick Abdallah and/or Beiter would have likewise have been unsuccessful. Most of the negative information about Abdallah became available after the trial. Whether Abdallah and Beiter had victimized other individuals did not equate to Clum's also being a victim. However, this "newly discovered" evidence is consistent with Beiter's and the co-defendants' continuing to victimize people. Had the alleged newly discovered negative information of Abdallah been available (Clum concedes that counsel was wary about calling him) and utilized at the trial, the jury would likely have viewed Abdallah as a conspirator (like Penny Jones); there is no showing that Clum would have benefitted from this "new"{2022 U.S. Dist. LEXIS 41} information. Indeed, it would have played into the Government's hands, as all being part of the "tax protester" sub-culture. If the jury did not believe Clum's "good faith accountant defense" based on reliance on accountant/conspirator Penny Jones, one more accountant/conspirator would not have helped Clum's case. Clum was portrayed as a dupe; the jury did not buy it. Abdallah's involvement would not have changed the outcome. *See also*, paragraph 51(B). Moreover, a severance would not have been granted. *See also*, paragraph 16(E). Even if granted, there was and is no showing that Penny Jones would have given favorable testimony; indeed, in her Motion to Vacate, Jones swore that Beiter and

B 15/18

Clum presented her an offer to prepare 1099(s) for $750 plus 10% of the client refund. Further, she contended that, contrary to her directive to Beiter, Clum and Peters, that her stamped name was used by other preparers. [CR-DE-819, p. 2]

53. This Court denied relief on December 5, 2017. [DE-47 in 17-61687CV]. No appeal was taken.

18-28

54. Instead, on February 20, 2018, Clum filed another § 2241 habeas petition in the Eastern District of Arkansas [DE-1 in 18-28CV]. On July 23, 2018, the petition was dismissed{2022 U.S. Dist. LEXIS 42} for lack of jurisdiction; the Arkansas court indicated that Clum could have appealed to the Eleventh Circuit [DE-16 in 18-28CV]. Instead Clum has waited almost four years to file these requests with the Eleventh Circuit. On November 1,2018, the Eighth Circuit affirmed [DE-25 in 18-28CV]. On May 28, 2019, the United States Supreme Court denied certiorari [DE-28 in 18-28CV]. *Clum v. Beasley*, 139 S. Ct. 2651 (2019).

DISCUSSION

55. In this untimely, successive motion to vacate, Clum relies on affidavits from Penny Lea Jones [DE-1, pp. 12-13], Michael David Beiter, Jr. [DE-1, pp. 14-17] and Gary W. Hoffman [DE-1, pp. 18-20]. He complains that he is actually innocent and was denied due process. Clum complains that IRS Agent Michele L. Lavaro testified falsely before the grand jury and at trial. He complains that another IRS Agent testified falsely at trial. Clum complains that there was insufficient evidence that he was involved with Forever Grace. He complains that there were multiple conspiracies. Clum asserts that Hoffman's affidavit is newly discovered evidence. He states that prosecutors suppressed favorable evidence in his prior § 2255 motion to vacate. Clum states he lacked *mens rea* to commit these crimes. He complains about procedural{2022 U.S. Dist. LEXIS 43} irregularities in his prior § 2255 case. Clum complains about the wording of the "Good Faith" jury instruction. He complains about ineffective assistance of trial counsel in his § 2255 motion to vacate.

56. This is a successive petition. Although Clum did not expressly consent to the recharacterization of his § 2241 petition to one under § 2255, he certainly did not voluntarily dismiss it; indeed, he acquiesced in the court's proceeding under a vehicle that could give him relief and participated in the recharacterized proceedings. Prior to filing a successive motion, a movant must receive authorization from the Court of Appeals to proceed. *See* 28 U.S.C. []2244(b)(3)(A). If a movant files a second or successive habeas petition without first obtaining permission from the appellate court the District Court is without jurisdiction to entertain it. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). Movant filed this second § 2255 motion without seeking leave from the Eleventh Circuit Court of Appeals. In the absence of such leave, this Court lacks jurisdiction to entertain the motion. *See id.* If the movant intends to pursue this case, he should forthwith apply to the United States Eleventh Circuit Court of Appeals for the authorization required by 28 U.S.C. § 2244(b)(3)(A).

57. Even if this Court had jurisdiction,{2022 U.S. Dist. LEXIS 44} the motion to vacate would be dismissed procedurally as being time-barred and alternatively, denied on the merits.

58. None of Clum's allegations are newly discovered, or they could not have been discovered by due diligence. Penny Lea Jones affidavit [DE-1, pp.12-13] about what she believes about Clum's involvent, would not have affected the outcome of the case, particularly since she would now be impeached with her sworn affidavit made in her previous motion to vacate. [CRDE-819, p. 2]. Moreover, Clum has not shown how he could not have obtained this affidavit years ago, since until two months ago, Jones was incarcerated in the Bureau of Prisons. Michael David Beiter's affidavit [DE-1, pp. 14-17] is the same affidavit [CR-DE-858-2] considered by the Court when it denied Clum's Motion for New Trial on November 3, 2015 [CR-DE-862]. Gary W. Hoffman's affidavit [DE-1, pp.

B 16/18

18-20] is the same affidavit [DE-045-1 in 17-61687CV] considered by the court when the Court denied the previous motion to vacate on December 5, 2017 [DE-47 in 17-61687CV].

59. On the merits, Clum's allegations are conclusory and insufficient upon which to base any relief. As the Court previously held, issues previously{2022 U.S. Dist. LEXIS 45} decided on direct appeal should not be litigated on collateral attack. *U.S. v. Nyhuis*, 211 F. 3d 1340, 1343 (11th Cir. 2000). False testimonies before the Grand Jury and at trial, insufficient evidence, multiple conspiracies, lack of *mens rea* and jury instructions errors were issued that were raised or could have been raised on direct appeal. The Court previously found that Forever Grace was just another sham entity operating within the confines of the original PMDD conspiracy [DE-47, pp. 14-15 in 17-61687CV]. The Court also previously found that the jury was entitled to disbelieve Clum's denial of involvement in Forever Grace [DE-47, p. 11 in 17-61687CV]. Complaints about irregularities in the previous §§ 2255 proceedings are matters that could have been raised in a timely motion under Rule 60 but are untimely now under Rule 60(c)(1).There was no counsel involved with Clum's prior § 2255 motion.

60. Again, issues raised on appeal or a prior collateral attack may not be again raised here. *Mills v. U.S.* 36 F. 3rd 1052, 1055 (11th Cir.) *cert denied*, 514 U.S. 1112 1995).

61. Affidavits from former co-defendants would not have affected the outcome of the case.

CONCLUSION

Wherefore, Clum's Motion to Vacate [DE-1] is Dismissed. He may now seek permission from the Eleventh Circuit Court of Appeal to file a successive motion. Alternatively,{2022 U.S. Dist. LEXIS 46} the motion is dismissed as time-barred. Alternatively, it is denied on the merits.

The Clerk shall close this case and deny any pending motions as moot.

The Clerk shall mail a copy of this order to Mr. Clum.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 25th day of May, 2022.

/s/ **William P. Dimitrouleas**

WILLIAM P. DIMITROULEAS

United States District Judge

FINAL JUDGMENT FOR RESPONDENT, ORDER DENYING CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court upon the Final Judgment and Order Dismissing Motion to Vacate [DE-1], signed on May 23, 2022. Accordingly, pursuant to Rule 58(a), Fed. R. Civ. Proc. and Rule 11(a), Section 2255 Proceedings, it is

ORDERED AND ADJUDGED as follows:

1. Judgment is entered on behalf of Respondent, against the Movant, David Clum, Jr.

2. On consideration of a Certificate of Appealability, the Court will deny such Certificate as this Court determines that Petitioner has not shown a violation of a substantial constitutional right. This Court notes that pursuant to Rule 22(b)(1), Fed. Rules App. Proc. Petitioner may now seek a certificate of appealability from the Eleventh Circuit Court of Appeals.

3. The Clerk shall close this case and deny any pending motions as Moot. The Clerk shall mail a copy of this order to Movant.

DONE AND ORDERED{2022 U.S. Dist. LEXIS 47} in Chambers at Fort Lauderdale, Broward

B 17/18

County, Florida, this 25th day of May, 2022.

/s/ **William P. Dimitrouleas**

WILLIAM P. DIMITROULEAS

United States District Judge

Footnotes

1

On October 20, 2017, the Court received a letter from private detective Gary W. Haffsman avocating for Clum's motion to vacate. [DE_34 in 17-61687]. On November 13, 2017 the Court received a letter from Clum's sister. [DE-43 in 12-61687].

B 18/18

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-11976

DAVID CLUM, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:22-cv-60954-WPD

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Read 11-29-23

CYZ

Before GRANT, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

C 2/2

§ 286. Conspiracy to defraud the government with respect to claims

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

0-2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 1273. Determination of amount of original issue discount.

(a) General rule. For purposes of this subpart [26 USCS §§ 1271 et seq.]—

(1) In general. The term "original issue discount" means the excess (if any) of—

(A) the stated redemption price at maturity, over

(B) the issue price.

(2) Stated redemption price at maturity. The term "stated redemption price at maturity" means the amount fixed by the last modification of the purchase agreement and includes interest and other amounts payable at that time (other than any interest based on a fixed rate, and payable unconditionally at fixed periodic intervals of 1 year or less during the entire term of the debt instrument).

(3) 1/4 of 1 percent de minimis rule. If the original issue discount determined under paragraph (1) is less than—

(A) 1/4 of 1 percent of the stated redemption price at maturity, multiplied by

(B) the number of complete years to maturity,

then the original issue discount shall be treated as zero.

(b) Issue price. For purposes of this subpart [26 USCS §§ 1271 et seq.]—

(1) Publicly offered debt instruments not issued for property. In the case of any issue of debt instruments—

(A) publicly offered, and

(B) not issued for property,

the issue price is the initial offering price to the public (excluding bond houses and brokers) at which price a substantial amount of such debt instruments was sold.

(2) Other debt instruments not issued for property. In the case of any issue of debt instruments not issued for property and not publicly offered, the issue price of each such instrument is the price paid by the first buyer of such debt instrument.

(3) Debt instruments issued for property where there is public trading. In the case of

§ 1275. Other definitions and special rules.

(a) Definitions. For purposes of this subpart [26 USCS §§ 1271 et seq.]—

(1) Debt instrument.

(A) In general. Except as provided in subparagraph (B), the term "debt instrument" means a bond, debenture, note, or certificate or other evidence of indebtedness.

(B) Exception for certain annuity contracts. The term "debt instrument" shall not include any annuity contract to which section 72 [26 USCS § 72] applies and which—

(i) depends (in whole or in substantial part) on the life expectancy of 1 or more individuals, or

(ii) is issued by an insurance company subject to tax under subchapter L [26 USCS §§ 801 et seq.] (or by an entity described in section 501(c) [26 USCS § 501(c)] and exempt from tax under section 501(a) [26 USCS § 501(a)] which would be subject to tax under subchapter L [26 USCS §§ 801 et seq.] were it not so exempt)—

(I) in a transaction in which there is no consideration other than cash or another annuity contract meeting the requirements of this clause,

(II) pursuant to the exercise of an election under an insurance contract by a beneficiary thereof on the death of the insured party under such contract, or

(III) in a transaction involving a qualified pension or employee benefit plan.

(2) Issue date.

(A) Publicly offered debt instruments. In the case of any debt instrument which is publicly offered, the term "date of original issue" means the date on which the issue was first issued to the public.

(B) Issues not publicly offered and not issued for property. In the case of any debt instrument to which section 1273(b)(2) [**26 USCS § 1273**(b)(2)] applies, the term "date of original issue" means the date on which the debt

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§ 6701. Penalties for aiding and abetting understatement of tax liability.

(a) Imposition of penalty. Any person—

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) Amount of penalty.

(1) In general. Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

(2) Corporations. If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $10,000.

(3) Only 1 penalty per person per period. If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

(c) Activities of subordinates.

(1) In general. For purposes of subsection (a), the term "procures" includes—

(A) ordering (or otherwise causing) a subordinate to do an act, and

(B) knowing of, and not attempting to prevent, participation by a subordinate in an act.

(2) Subordinate. For purposes of paragraph (1), the term "subordinate" means any other person (whether or not a director, officer, employee, or agent of the taxpayer involved) over

0-6 Y2

whose activities the person has direction, supervision, or control.

(d) Taxpayer not required to have knowledge. Subsection (a) shall apply whether or not the understatement is with the knowledge or consent of the persons authorized or required to present the return, affidavit, claim, or other document.

(e) Certain actions not treated as aid or assistance. For purposes of subsection (a)(1), a person furnishing typing, reproducing, or other mechanical assistance with respect to a document shall not be treated as having aided or assisted in the preparation of such document by reason of such assistance.

(f) Penalty in addition to other penalties.

(1) In general. Except as provided by paragraphs (2) and (3), the penalty imposed by this section shall be in addition to any other penalty provided by law.

(2) Coordination with return preparer penalties. No penalty shall be assessed under subsection (a) or (b) of section 6694 [26 USCS § 6694] on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

(3) Coordination with section 6700 [26 USCS § 6700]. No penalty shall be assessed under section 6700 [26 USCS § 6700] on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) *Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) *Finality.* The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) *Appeal.*

(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion

for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

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(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

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§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

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